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IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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BRIEF OF THE DKT LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF THE DKT LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The DKT Liberty Project respectfully submits this brief as amicus curiae in support of the Appellants in accordance with the provisions of Supreme Court Rule 37.2. All parties have consented to this filing, and their written consents have been lodged with the Court.[1]

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[1] *Amicus* certifies that no counsel for a party authored this brief in whole or in part, nor has any person nor entity, other than *Amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

As Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is a not-for-profit organization that advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to vote because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. To help preserve these essential rights, the Liberty Project advocates for the rights of individual Americans to choose the officials who will represent them. Increasing electoral fairness and providing voters with meaningful options to select public officials – rather than granting advantages to the re-election of incumbent officeholders – is a paramount goal of the Liberty Project and at the heart of its mission.

STATEMENT OF THE CASE

The core question at issue in this case is whether Pennsylvania Act 34 – which re-drew Congressional districts in Pennsylvania based on the 2000 census – constitutes an unconstitutional partisan gerrymander. At a more general level, however, this case is another in a long line of congressional, state and local redistricting cases stretching back to the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in which the use of single-member district reapportionment plans have incited constitutional controversy. This is at least in part because the advances in technology and the precision of modern census information have made the crafting of single-member districting plans into an outcome determinative endeavor – we know as soon as the districts are created who the winners and losers are

likely to be or, more precisely, which groups of voters will be able to elect their candidates of choice and which will not.

The sole purpose of this brief is to propose a remedy that could be used to cure any constitutional deficiency in the Pennsylvania plan, and that that remedy also could be used more broadly to overcome the seemingly never-ending legislation-litigation cycle by eliminating the outcome determinative nature of single-member redistricting plans in a manner that is – essentially – above constitutional challenge. This elixir is the use of multimember districts with alternative voting mechanisms.[2]

This Court consistently has held that multimember districts are not per se unconstitutional. Rather, it is the traditional "winner-take-all" approach that often leads to minority vote dilution in the context of multimember districts. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982) (noting same); *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1971) (same). The traditional "winner-take-all" form of at-large elections in multimember districts allows each voter to cast only one vote for each candidate, up to the number of available seats in the district. But a number of alternative voting mechanisms exist for use in multimember districts that do not employ a winner-take-all approach and thus avoid this constitutional pitfall. Three alternative voting

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[2] Although multimember districts with alternative voting mechanisms cannot be used to elect Members of Congress under current law, *see* 2 U.S.C. § 2c, that statutory requirement may be unconstitutional given the outcome determinative nature of single-member districting plans. Although that constitutional question is not before the Court in this case, the Court's decision in this case invariably will influence the consideration of redistricting litigation at the state and local as well as the Congressional levels.

mechanisms in particular have been employed most often by States and have received the most attention from the courts: cumulative voting, limited voting, and preference (or choice) voting.[3]

1. Cumulative Voting

Voters in a multimember district that uses a cumulative voting system are given a certain number of votes that they can distribute among a group of candidates in any proportion they choose. Typically, voters receive as many votes as there are seats to fill. Voters may give all of their votes to one candidate ("plumping"), give one vote to each of several candidates, or distribute their votes in any other desired combination. For example, in the case of an at-large district in which three seats are available, voters would be assigned three votes. They may cast three votes for a single candidate, cast one vote for each of the three candidates, or make intermediate distributions with some candidates

[3] It is important to note at the outset that the use of multimember districting plans with alternative voting mechanisms is fully consistent with the Equal Protection Clause's "one-person, one-vote" requirement. The requirement is intended to ensure that votes cast by all individuals are imbued with equal strength. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The principle inherent in the one-person, one vote mandate is not compromised by the use of multimember districts and alternative voting mechanisms. *See Chapman v. Meier*, 420 U.S. 1, 15 (1975) (reaffirming prior holding that States may devise apportionment plans in multimember districts to comply with one person, one vote principle); *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 984 (N.D. Ill. 1998) ("By allowing each voter the same number of votes, cumulative voting subscribes to the one-person, one-vote requirement with numeric exactness.").

receiving multiple votes and some candidates receiving single votes. Cumulative voting gives minority groups that vote as a bloc the option of concentrating their votes on a few candidates and ensuring their election.

In *Dillard v. Chilton County Bd. of Education*, the court approved a settlement imposing cumulative voting as a remedy for a vote dilution claim in a multimember district. 699 F. Supp. 870, 876. (M.D. Ala. 1988). The court focused its analysis specifically on whether the minority voters in the county would have the potential to elect the representatives of their choice, even in the face of the "worst case scenario" – the most racially polarized voting pattern. Under that scenario, it is assumed that the majority group sponsors only as many candidates as there are seats to fill and spreads its votes evenly among its candidates, with no "cross-over voting" for the minority preferred candidate. *Id.* at 874. The court found that a minority group could elect its preferred candidate in a cumulative voting system – even under the most unfavorable conditions – as long as it had a population meeting or exceeding the "threshold of exclusion."[4] If the minority population exceeds or approaches the threshold of exclusion, cumulative voting has virtually the same effect as the creation of single-member, majority-minority districts.

[4] As an empirical matter, the threshold of exclusion is "the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances," typically expressed as "1 / 1+ # of seats." *Dillard*, 699 F. Supp. at 874. An analysis of the threshold of exclusion can be undertaken with respect to any alternative voting mechanism and the details of the chosen voting mechanism (such as the number of counties and thus the number of seats at stake) can be tailored to fit the actual characteristics of the district in question.

Because this number typically is similar to the number necessary for the creation of a single-member, majority-minority district, the two remedies generally have virtually the same effect. Accordingly, the *Dillard* court found that cumulative voting was an appropriate, alternative remedy for curing the alleged Section 2 violation. *Id.* at 875.

Cumulative voting has been used in a number of States, including Alabama, Texas, New Mexico and Illinois. *See, e.g., McCoy*, 6 F. Supp. 2d at 974 (adopting cumulative voting system for election of city aldermen and park board members in Chicago Heights, Illinois); *Dillard*, 699 F. Supp. at 876 n.7 (approving cumulative voting as proposed remedy for violation of the Voting Rights Act and noting that cumulative voting "is becoming rather common in Alabama"); Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 Soc. Sci. Q. 973, 974 (December 1997) ("By mid-1997, at least fifty-seven local governments in five states had adopted cumulative voting to elect their legislative bodies."); Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 757 (1992) (describing the use of cumulative voting in Peoria, Ill.); Richard L. Engstrom, et al., *Limited and Cumulative Voting in Alabama: An Assessment After Two Rounds of Elections*, 6 Nat'l Pol. Sci. Rev. 180, 185-189 (1997) (describing the use of cumulative and limited voting by localities in Alabama since 1988); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 233 (Winter 1989) (describing the use of cumulative voting in city council elections in Alomogordo, New Mexico).

Illinois has more experience than any other State with cumulative voting. In 1870, the Illinois Constitutional Convention adopted cumulative voting for elections of representatives to the Illinois General Assembly. Illinois Assembly on Political Representation and Alternative Electoral Systems, Executive Summary, at 15 (Spring 2001) ("Illinois Assembly Executive Summary"). Cumulative voting remained in effect in Illinois Assembly elections until 1982. *Id.* at 17. During the two decades of using single member districts that have followed, Illinois voters have had fewer electoral choices, voter turnout has declined and it is likely that minority representation has not been as strong as it would have been if cumulative voting had been maintained. *Id.* at 18-22.

2. Limited Voting

Limited voting operates in a manner similar to cumulative voting. In a limited voting system, each voter casts one vote per candidate to fill a number of seats, but the total number of votes that each voter may cast is fewer than the total number of seats to be filled. In a three-seat district, for example, each voter may receive one vote. This limitation prevents a majority voting as a bloc from filling every available seat with its chosen candidates, thus affording minority groups the opportunity to fill the void. Because the number of votes allotted to each voter in a limited voting scheme is malleable, such schemes can be tailored to satisfy the unique circumstances of a particular district so that if a minority group votes as a bloc it will have the ability to elect its candidate of choice.

Limited voting has been court-approved for use and implemented for local elections in North Carolina, Alabama, Connecticut and Pennsylvania. *See, e.g., Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991) (approving

settlement that included a multimember district with limited voting to elect Beaufort County, North Carolina Board of County Commissioners); *Orloski v. Davis*, 564 F. Supp. 526, 536 (M.D. Pa. 1983) (rejecting equal protection, State Constitution and Voting Rights Act challenges to limited voting scheme for judicial elections in Pennsylvania); *Lo Frisco v. Schaffer*, 341 F. Supp. 743, 751 (D. Conn. 1972) (upholding statute calling for limited voting scheme for Boards of Education elections in Connecticut); *Kaelin v. Warden*, 334 F. Supp. 602, 609 (E.D. Pa. 1971) (upholding limited voting scheme to elect County Commissioners in Bucks County, Pennsylvania). *See also* Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 266 (1995) ("Between twenty and twenty-three jurisdictions in Alabama use limited voting[.]"); Karlan, 24 Harv. C.R.-C.L. L. Rev. at 225 (noting that New York Court of Appeals upheld limited voting for New York City elections).

3. Preference (or Choice) Voting

Preference voting – also known as choice voting – requires voters to rank candidates in their order of preference by placing numbers on the ballot next to each candidate's name. Votes are then tallied in a series of rounds. In the first round, candidates receiving a specified percentage of first-choice votes win a seat. That percentage is the fewest number of votes that a candidate must receive to win a seat.[5] After the first round, the winning candidates' excess votes (the number received above the minimum needed to win a seat) are reassigned based on the second choice preferences of all the voters who ranked the winning candidates as their first choice. Following this reassignment, the second round

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[5] This number is the same as the threshold of exclusion.

of counting is undertaken and any candidate receiving more than the minimum in that round is awarded a seat. If no candidate reaches the minimum, the lowest vote-getter in the election is disqualified and that candidate's votes are reassigned based on the second choices selected by the voters. This process of seating and disqualifying candidates in rounds of counting continues until every seat is filled.

Preference voting has been employed successfully in elections in Cambridge, Massachusetts, New York City, and at least two dozen other jurisdictions expressly for the purpose of increasing minority representation in those jurisdictions. *See* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1879 (June 1999). These efforts have met with marked success. When New York City began using preference voting in 1970, for example, the number of successful African-American and Hispanic candidates increased such that the number of representatives from these minority groups nearly matched the percentages of those groups in the overall population. *Id.* at 1893. Representation for these groups also proportionally increased in elections following 1970 as their percentages of the population increased. *Id.*

SUMMARY OF THE ARGUMENT

A range of options beyond the traditional remedies exist that can address the infirmity of partisan gerrymandering. These options include the creation of multimember districts with alternative voting mechanisms such as cumulative voting, limited voting, and preference (or choice) voting. Multimember districts with alternative voting mechanisms can remedy partisan gerrymandering by allowing for groups of voters to elect their representatives of choice and

simultaneously allow for district boundaries to be drawn consistent with traditional districting principles.

In fact, alternative voting mechanisms may present advantages over drawing new single member districts because any attempt to re-draw single member districts may depart from traditional districting principles. These departures, in turn, invite further challenge under *Shaw*. *Shaw* and its progeny have made clear that there are constitutional constraints on the ability of legislatures to abandon traditional districting principles and, instead, draw district lines based upon the traits of individual voters and groups of voters. Properly used, alternative voting mechanisms are resistant to such challenges whether the challenges are based on allegations of racial or partisan gerrymandering. Multimember districts with alternative voting mechanisms also are fully consistent with the Voting Rights Act.

Because the use of alternative voting mechanisms in multimember districts not only comports with the law, but, post-*Shaw*, offers advantages over the creation of new single member districts, alternative voting mechanisms should be considered as an available remedy that courts and legislatures may use to redress charges of partisan gerrymandering.

ARGUMENT

I. USE OF MULTIMEMBER DISTRICTS WITH ALTERNATIVE VOTING MECHANISMS COULD RESOLVE CLAIMS OF PARTISAN GERRYMANDERING WITHOUT CREATING NEGATIVE IMPLICATIONS UNDER *SHAW v. RENO*

A. Multimember Districts with Alternative Voting Mechanisms Can Help Remove the Discriminatory Effects of a Challenged Districting Plan

The most common manner of remedying a gerrymander is to draw new single member districts that ameliorate the discriminatory effect of the challenged plan. Multimember districts coupled with alternative voting mechanisms, however, also can address such discriminatory effects.

Partisan gerrymandering occurs where there has been "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). Alternative voting mechanisms can cure discriminatory effects by giving voice to every identifiable political group within a multimember district that has more members than the threshold of exclusion. *See Section I. C, infra.*

According to *Bandemer*, discriminatory effects can take two forms. Such effects can be evidenced either by "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133. Alternative voting mechanisms avoid both ills. These mechanisms give groups of like-minded voters the ability to elect a number of candidates of their choice that is consistent with the voting

strength of each group regardless of majority or minority status.[6]

Moreover, district lines for these large, multimember districts can be drawn consistent with traditional political boundaries, thereby protecting against the discriminatory intent that often can infect the process when districts cut across traditional lines.

B. Multimember Districts with Alternative Voting Mechanisms Can Remedy Partisan Gerrymandering More Effectively than Single Member Districts

Appellants argue correctly that *Bandemer* must be read in light of the *Shaw v. Reno, 509 U.S. 630 (1993),* line of cases and that, accordingly, districting plans that abandon traditional districting principles and instead focus on the party affiliations of voters violate the Constitution. Petition for Writ of Certiorari at 22-23. In fact, the *Bandemer* decision was based, in part, on the fundamental similarities between political and racial gerrymandering claims. *See Bandemer*, 478 U.S. at 125 ("Justice O'Connor's attempt to distinguish this political gerrymandering claim from the racial gerrymandering claims that we have consistently adjudicated demonstrates the futility of such an effort."), 131 n.12 ("Although these cases involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts."). The *Shaw* requirement that voter characteristics

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[6] It is important to note that these systems give groups of voters electoral opportunities, but do not guarantee any outcomes. Groups actually must mobilize and vote in order to take advantage of these opportunities and elect their candidates of choice.

not be unduly elevated at the expense of traditional districting principles, however, makes it more difficult to remedy partisan gerrymandering claims. *See Shaw* at 642. As in the race context, any re-drawing of single member districts will have to take party affiliation into account to ensure that discrimination is remedied. But, while it certainly is not unconstitutional to consider party affiliation, re-drawing district lines according to party affiliation risks a new abandonment of traditional districting principles and a new partisan gerrymander.

Multimember districts and alternative voting mechanisms provide a solution to this difficult balancing act. Multimember districts drawn in a partisan-neutral manner in accordance with traditional districting principles do not implicate *Bandemer* – even when read in conjunction with *Shaw*. In fact, alternative voting systems do not make any assumptions about the cohesiveness of groups of voters. They simply provide a mechanism whereby groups that do, in fact, vote as a bloc may elect their preferred candidates.

II. USE OF MULTIMEMBER DISTRICTS WITH ALTERNATIVE VOTING MECHANISMS IS WHOLLY PERMISSIBLE UNDER BOTH SECTION 2 OF THE VOTING RIGHTS ACT AND *SHAW v. RENO*

When fashioning a remedy to a claim of partisan gerrymandering, one must be mindful of the need to comply with both Section 2 of the Voting Rights Act and *Shaw*. Alternative voting mechanisms comply with these requirements and thus may present advantages for districting efforts in the wake of *Shaw*.

A. Alternative Voting Mechanisms Comply with Section 2 of the Voting Rights Act.

1. The *Gingles* Test

Section 2 of the Voting Rights Act prohibits any voting procedure that "results in a denial or abridgement of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. The essence of a Section 2 claim is a charge that an electoral law, practice, or structure will "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Proof of a discriminatory motive is unnecessary. Rather, a violation of Section 2 is established by showing that, "based on the totality of the circumstances," members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).[7]

Gingles thus establishes a "results oriented" test for evaluating when and how a State must draw district lines to enhance the voting power of a minority group. At the heart

[7] The Senate Judiciary Report accompanying this provision (as amended in 1982) listed a number of factors that may be used to prove a Voting Rights Act violation, including the history of voting-related discrimination in the state or political subdivision; the extent to which voting is racially polarized; and the extent to which members of the minority group have been elected to public office in that jurisdiction. Judiciary Comm., Voting Rights Act Amendments of 1982, S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. These factors are neither comprehensive nor exclusive. *See Gingles*, 478 U.S. at 45.

of *Gingles* is the admonition that politically cohesive minority groups may not have their voting power impermissibly "diluted" by multimember districting or at-large electoral processes that "submerge" the minority group in a constituency in which a "bloc voting majority" usually is able to defeat the minority group's favored candidates. *Gingles*, 478 U.S. at 47-49. Minority vote dilution typically occurs in a single-member districting context when a plan fragments large concentrations of minority populations and disperses them into separate electoral districts ("fracturing" or "cracking") or, conversely, concentrates minorities into districts so that they constitute an excessive "super-majority" and thus deprives the group of voting power in multiple districts ("packing"). *See id.* at 46 n.11.

Under *Gingles*, a Section 2 prima facie case requires proof of three "preconditions:"

> (1) The minority group is large enough and located in a sufficiently geographically compact area to make up a majority in a single member district;
>
> (2) The minority group is politically cohesive; and
>
> (3) There is bloc voting by the white majority such that the minority's preferred candidate usually is defeated.

478 U.S. at 50-51. The first and second *Gingles* factors together establish that a minority group has sufficient potential to elect its representative of choice in a single-member district; the second and third factors together establish that the challenged district(s) thwarts a distinctive minority vote by cracking or packing the minority voting

group, or by submerging it in a larger white voting population. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (citing *Gingles*). If all of these preconditions are not satisfied, there has been no wrong, and Section 2 thus requires no remedy.[8] *Id.*

Where the *Gingles* preconditions are satisfied, the remedy typically has been the creation of single-member districts in which a majority of residents are members of the minority group on whose behalf the Section 2 challenge was asserted. The use of single member districts to remedy these problems, however, can create significant practical and constitutional problems. As a practical matter, racial minority populations often are dispersed geographically, making it difficult to create appropriate districts. To overcome this problem, single-member districts run the risk of being drawn with unsightly and uneven district boundaries that are subject to equal protection challenges. *See infra* at II.B (discussing *Shaw* and its progeny). Although single-member districts have been the more common remedy for redressing partisan gerrymandering and minority vote dilution, by no means have they been the exclusive remedy. To the contrary, several jurisdictions have implemented alternative voting mechanisms in multimember districts to remedy alleged voting rights violations.[9]

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[8] Even where all three preconditions are satisfied, a finding that Section 2 has been violated is not automatic. *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (finding no violation of Section 2, despite proof of preconditions, based on the "totality of the circumstances").

[9] *See, e.g., Moore*, 936 F.2d at 164 (approving settlement that included a multimember district with limited voting in North Carolina); *McCoy*, 6 F. Supp. 2d at 985 (adopting cumulative voting as complete and adequate remedy to

2. Alternative Voting Mechanisms Are Fully Permissible Under *Gingles* Because They Enable Cohesive Minority Groups To Elect Their Candidates of Choice.

As discussed above, the central purpose of the *Gingles* test is to evaluate whether a minority community that is unable to elect its preferred candidate(s) under a challenged districting scheme would be able to seat its candidate(s) of choice under an alternative districting scheme. Use of an alternative voting system in a multimember district has the same effect as the creation of a single-member majority-minority district – it allows for the election of the minority group's preferred candidate(s) if the group is sufficiently large and politically cohesive. All three alternative voting mechanisms discussed above – cumulative, limited and preference voting – enable minority groups to secure the election of their preferred candidates, even in the face of racially polarized voting. They do this by effectively fragmenting the voting power of electoral *majorities* – irrespective of race, ethnicity or any characteristic other than pure political preference. For racial minorities, the effect is the same as it would be through the creation of a single-member majority-minority district.

Section 2 violation); *Dillard*, 699 F. Supp. at 876 (approving cumulative voting scheme as Section 2 remedy in Chilton County, Alabama); *Orloski*, 564 F. Supp. at 536 (rejecting Voting Rights Act challenges to limited voting scheme in Pennsylvania); *Lo Frisco*, 341 F. Supp. at 751 (upholding statute calling for limited voting scheme in Connecticut); *Kaelin*, 334 F. Supp. at 609 (upholding limited voting scheme in Pennsylvania).

Cumulative voting accomplishes this result by giving all groups the opportunity to concentrate their votes on a few candidates and secure their election. *See Dillard*, 699 F. Supp. at 875 (cumulative voting "provides black voters [] with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting"). If five seats are open in a district, for example, voters would have five votes each to distribute as they choose. Because the same majority cannot concentrate its votes on all five seats, they cannot dominate the election. Instead, voters in a sufficiently large minority group – more than one-sixth of the electorate in a five-seat race – can assure their candidate's election regardless of how other voters, including a majority, cast their ballots. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 254.

Limited voting operates similarly, except that voters have fewer votes to cast than the number of seats to fill. By limiting each voter to, for example, one or two votes in a five-seat election, the same majority group cannot dominate every seat. As under a cumulative voting system, cohesive minority groups that are sufficiently large are empowered to control the outcome of at least one seat. *Id.* Under a preference voting system, the vote-transferring process increases the proportion of voters who vote for a winning candidate. It does this by transferring "wasted" votes – votes that are cast for a candidate who would win without them or who could not win with them – onto the next ranked candidates of a voter's ballot. Preference voting thus enables electoral minorities to control some seats in a multimember race even in the face of extreme majority opposition. In a race for five seats, for example, a candidate with just over one-sixth of the total vote will win a seat. A minority voting bloc of that size is thus sufficient to ensure election of at least one representative of its choice. *Id.*

Evidence from several multimember jurisdictions that have employed such alternative voting mechanisms demonstrates that these systems are in fact useful in enhancing minority representation. In Alabama, for example, nine counties began using limited voting in response to Section 2 challenges to districting plans in the late 1980s.[10] In the first elections following implementation, an African-American candidate won in thirteen of the fourteen municipalities in which an African-American candidate ran for office. Mulroy, 77 N.C. L. Rev. at 1891. The only unsuccessful African-American candidate lost by a single vote. *Id.* In ten of the thirteen Alabama municipalities that employed alternative voting systems, the minority candidates were the first African-Americans ever elected to office in those jurisdictions. *Id.*

The results of elections in Chilton County, Alabama following the settlement achieved in *Dillard* demonstrate the effectiveness of a cumulative voting system. In the first election following the settlement, Chilton County elected its first African-American representative to the County Commission since Reconstruction. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 272. In fact, that candidate was the leading vote-getter in the election despite the fact that he received support from only 1.5 percent of white voters. *Id.* This was because he received votes from virtually every African-American voter in the county, many of whom cast multiple votes for him. *Id.* An African-American candidate also was elected to the Board of Education in Chilton County

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[10] These plans were pre-cleared by the U.S. Department of Justice pursuant to Section 5 of the Voting Rights Act. Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 Nat'l Civic Rev. 66, 67 (Winter 1995); *see infra* section III.

in the first two elections held with cumulative voting in place. *Id.*

Alternative voting systems also can remedy minority vote dilution in situations where a single-member districting scheme might fail, such as where a single-member districting plan would leave some members of the minority group outside the remedial minority district. *See, e.g., Dillard,* 699 F. Supp. at 876 (noting the usefulness of alternative voting systems where minority populations are dispersed). Moreover, because alternative voting mechanisms can be tailored to the size of the minority population within a county (or counties) such that minority groups will be able to elect as many or more candidates of choice as they can under single-member majority-minority districts, such mechanisms in many circumstances do a *better* job of meeting Voting Rights Act goals.

B. Alternative Voting Systems also Satisfy Equal Protection Requirements and Thus Present Clear Advantages for Districting Efforts in the Wake of *Shaw v. Reno.*

As demonstrated above, the use of alternative voting mechanisms in multimember districts enhances the ability of cohesive groups to elect their preferred candidates at the polls. In this regard, they are at least as effective as the creation of single-member majority-minority districts in avoiding retrogression. Because alternative voting mechanisms accomplish this objective in a fashion that is neutral in terms of party and race, however, they also offer clear advantages in terms of compliance with equal protection constraints on the redistricting process. In this case, they offer a solution that navigates the narrow passage between the *Shaw* line of cases and claims of partisan gerrymandering.

In *Shaw*, the U.S. Supreme Court held that the deliberate segregation of voters into districts on the basis of race properly states a claim for "racial gerrymandering" under the Equal Protection Clause of the Fourteenth Amendment.[11] 509 U.S. 630.

A claim of racial gerrymandering, like all laws that classify citizens on the basis of race, is constitutionally suspect and subject to strict judicial scrutiny. *Id.* at 657. To prevail, a plaintiff must demonstrate that race is the "predominant" consideration in drawing district lines such that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Once a plaintiff proves that race predominates, the burden shifts to the defendant to show that its use of race in districting was "narrowly tailored to achieve [a] compelling state interest;" if this burden cannot be satisfied, the plan cannot be upheld. *Id.* at 920. This narrowly limits the ability of states to take race into account, and avoid retrogression, by drawing single member districts because such a plan would "not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655.

Since 1993, courts have invoked *Shaw* to invalidate majority-minority districting plans in a number of States on

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[11] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person with in its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central purpose is to prevent the States from intentionally discriminating against individuals on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

the grounds that race was the predominant factor motivating the shape and size of the district. *See, e.g., Miller*, 515 U.S. at 915-917 (invalidating Georgia legislative district because race was predominant factor motivating boundary lines); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (invalidating North Carolina districting plan because race was predominant factor used to draw majority-minority district); *Bush v. Vera*, 517 U.S. 952, 955-57 (1996) (invalidating Texas legislative redistricting plan that demonstrated "substantial disregard for the traditional districting principles" in favor of establishing majority-minority districts based on race). *Shaw* and its progeny thus severely restrict a State's ability to draw districts that enhance minority representation because, if race is too central to a district's boundary determination and there is no compelling justification for using race as a proxy, then the district violates the equal protection requirement.

Factors including unusually-shaped or unnatural district boundaries that "pack" minority populations into a small number of districts and the use of narrow land bridges to "grab" otherwise separate minority populations influence the determination of whether race impermissibly was the predominant factor in a districting scheme. *Miller*, 515 U.S. at 917; A. 2827. Unlike single-member majority-minority districts, multimember districts that are drawn in a race-neutral manner in accordance with traditional districting principles by definition do not implicate *Shaw*.

Alternative electoral systems, moreover, avoid the pernicious assumption that the *Shaw* line of cases rejects as "odious to a free people whose institutions are founded upon the doctrine of equality," 509 U.S. at 643 (*citing Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) – that voting behavior can be predicted based solely on skin color. At the heart of the Court's objection in *Shaw* was the notion that members of the same racial group – regardless of their

age, education, status, or community – think alike, share the same political views, and will prefer the same candidates at the polls. *Shaw*, 509 U.S. at 647; *see also Gingles*, 478 U.S. at 46 (a court may not presume bloc voting within a minority group). *Cf. Holland v. Illinois*, 493 U.S. 474, 484 n. 2 (1990) (finding assumption that black juror will be partial to black defendant based on skin color to be unconstitutional racial stereotype). Alternative voting systems do not assume voting behavior for any group, minority or otherwise. Instead, they simply provide a mechanism for groups voting as a bloc – *i.e.*, groups that demonstrate electorally that they *do share* the same political views and prefer the same candidates at the polls – to ensure the election of their preferred candidates.[12]

By the same token, alternative voting systems avoid the "representational" harm caused when a district is created solely to effectuate the perceived common interests of one racial group. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 352 (Summer 1998). Because alternative voting mechanisms treat voters of all races alike, they do not "stigmatize individuals by reason of their [race]," and because they do not create "safe" districts for minorities, incumbents are discouraged from believing that "their

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[12] *See also* Brischetto & Engstrom, 78 Soc. Sci. Q. at 989 ("Cumulative voting can provide minority electoral opportunities while avoiding what the Supreme Court views as objectionable features of some single-member districting schemes – the 'segregation' of voters into racially identifiable election units . . . .Dilution can be combated, therefore, while retaining an incentive for coalition building across a jurisdiction based on interests that are not necessarily defined by race . . . .").

primary obligation is to represent only the members of [a racial] group, rather than their constituency as a whole." *United States v. Hays*, 515 U.S. 737, 744 (1995) (*citing Shaw*, 509 U.S. at 643). *See also* Mulroy, 33 Harv. C.R.-C.L. L. Rev. at 352.

Because alternative voting systems do not employ racial classifications in any manner, districting plans that use them are not subject to strict scrutiny under *Shaw* and its progeny. This conclusion applies with equal force even if alternative voting mechanisms are employed for the purpose of facilitating minority representation. It is the classification of individuals on the basis of race, not the mere motivation to facilitate equal opportunity for representatives of all races, that requires heightened scrutiny. *See Shaw*, 509 U.S. at 653; *see also Vera*, 517 U.S. at 993 (Section 2 "must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate unjustified use of racial stereotypes") (O'Connor, J., concurring).

III. MULTIMEMBER DISTRICTS THAT EMPLOY ALTERNATIVE VOTING MECHANISMS EXPAND ELECTORAL OPPORTUNITY AND THUS QUALIFY FOR PRECLEARANCE UNDER SECTION 5

"Section 5 of the Voting Rights Act authorizes preclearance of a proposed voting change that 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 354 (2000) (*"Bossier Parish II"*) (*quoting* 42 U.S.C. § 1973c). The key question under Section 5 is "'whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected

by the change affecting voting . . . .'" *Beer v. United States*, 425 U.S. 130, 141 (1976) (*quoting* H.R. Rep. No. 94-196, p. 60). "In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141; *see also Bossier Parish II*, 528 U.S. at 329 (holding that retrogression is the focus of the analysis under both the "purpose" and "effect" components of the Section 5 inquiry).

The use of properly constructed alternative voting mechanisms in multimember districts satisfies the Section 5 non-retrogression requirement because, as discussed at length above, such mechanisms expand the "effective exercise of the electoral franchise" for all voters. Indeed, although traditional at-large electoral schemes disable minority groups from electing candidates of their choice by submerging them in larger multimember districts, the use of alternative voting mechanisms cures any such vote dilution by enabling cohesive minority groups to elect the candidates of their choice. *See supra* at II.A.2. And, as the Supreme Court only recently reiterated, "'[i]t is [ ] apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.'" *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (*"Bossier Parish I"*) (*quoting Beer*, 425 U.S. at 141).

In addition, because the fundamental objective of the use of alternative voting mechanisms is to allow any sufficiently large and cohesive voting bloc to elect candidates of choice, the ability of such a group to elect candidates of choice should correspond closely to the relative voting strength of

that group, if the alternative voting mechanisms are properly constructed. As the Supreme Court made clear in *Richmond v. United States*, 422 U.S. 358 (1975), voting changes such as this that will "'fairly reflect[] the strength of the [minority] community'" cannot be said to violate Section 5. *Bossier Parish II*, 528 U.S. at 330 (*quoting Richmond*, 422 U.S. at 371).[13]

DOJ's prior administrative preclearance efforts demonstrate that multimember districting plans that employ alternative voting mechanisms qualify for preclearance under Section 5. Since 1985, for example, at least 52 jurisdictions have submitted electoral plans incorporating alternative voting mechanisms to DOJ for preclearance. Of these, 47 received final determinations from DOJ and, in all but one of these submissions, preclearance was granted. Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 Nat'l Civic Rev. 66, 67 (1995). All 29 of the submissions that employed limited voting in at-large districts were precleared, including the voting plan adopted by several Alabama municipalities in a settlement of a vote dilution claim, and that settlement was upheld in *Dillard v. Baldwin County Bd. of Education*, 686 F. Supp. 1459 (M.D. Ala.

[13] *Richmond* "involved requested preclearance for a proposed annexation that would have reduced the black population of the city of Richmond, Virginia from 52% to 42%." *Bossier Parish II*, 528 U.S. at 330. The *Richmond* Court found that if the City's pre-existing multimember at-large voting scheme for the nine-person city council were replaced by a voting system that "fairly reflects the strength of the Negro community as it exists after the annexation," such an annexation cannot be found to be barred by Section 5. *Richmond*, 422 U.S. at 371.

1988). *See* Mulroy, 84 Nat'l Civic Rev. at 67. In addition, cumulative voting plans were precleared in all but one of the 18 submissions that proposed their use in multimember districts.[14] *Id.* Significantly, several of the Section 5 submissions that utilized alternative voting mechanisms involved districts in which it would have been possible to draw single-member minority-majority districts to enhance minority electoral opportunities. *Id.* at 67. DOJ also has entered into consent decrees under which limited voting mechanisms were adopted. *See id.* at 69 (discussing litigation settlements to which DOJ consented involving multimember districts with limited voting systems for elections in North Carolina and Georgia).

There thus appears to be no question that multimember districting plans that employ properly constructed alternative voting mechanisms warrant preclearance under Section 5.

[14] Even in the one cumulative voting submission to which DOJ initially objected, the Department ultimately precleared a revised cumulative voting plan for the jurisdiction in question. *Id.* at 68. The initial objection was based on evidence that the city council had failed to investigate whether the minority community understood the cumulative voting system or would require bilingual education regarding the new system.

CONCLUSION

For the foregoing reasons, the DKT Liberty Project urges this Court to recognize the role that multimember districts with alternative voting mechanisms can play in remedying claims of partisan gerrymandering as well as other unconstitutional redistricting practices.

Respectfully Submitted,

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